Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE DATE AND AUTHORSHIP OF THE STATUTE OF FRAUDS.

IT is an astonishing fact that the authorship[1] of the Statute of Frauds has not in the past been wholly clear, and will never perhaps be fully known, and it is even more strange that there has been a long standing misapprehension as to the exact date of its passage. Mr. Browne in his treatise on the Statute of Frauds assigns no date to the statute, and in the various case-books and text-books in which the statute is referred to by date the dates given vary. The reasons for that variance are found (1) in the change in the calendar which took place in England long after the Statute of Frauds was passed but before the Cambridge edition of 1763 of the Statutes at Large, (2) in the practical inaccessibility of the journals of the Houses of Parliament until their publication by authority in 1803, (3) in the fact that while the edition of the English statutes published in 1819 adopted 1677 as the date of the Statute of Frauds, the Cambridge edition of 1763 gave it as 1676, and (4) in the natural temptation for writers to accept without question any date which had been adopted in the edition of statutes consulted by them or accepted by persons of repute as correct, and into which the phrase "29 Car. II" seemed fairly translatable.

I. THE DATE OF THE STATUTE.

As late as 1884[1] as careful a writer as Mr. James Schouler discussed the date of the passage of the Statute of Frauds as one of probabilities and concluded that it must have been passed in 1676. That conclusion is erroneous, as will presently be seen, but his line of argument so fully explains the grounds of the most widely accepted guess as to the date of the statute that it seems desirable to quote his words. He said:

"Turning then to the British Statutes at Large of this early period, we find that the Cambridge edition of 1763 dates all the acts of 29 Car.

[1] "The Authorship of the Statute of Frauds," 18 AM. L. REV. 442.

II as of 1676; while the later 'Statutes of the Realm,' printed in 1819, under the authority of Parliament, styles them all as of 1677. Neither of these statements is strictly correct, for the year 29 Car. II is properly 1676–77, just as the new year of our national administration would be 1884–85. The precise method of giving the royal assent to acts of Parliament so soon after the downfall of the Commonwealth may be a matter of some doubt; but we presume that the years of Car. II were reckoned from the date of the King's birthday and his restoration, — *i. e.* May 29, — a day which the legislature had lately declared should be observed for a perpetual anniversary. The Statute of Frauds stands the third in order among ten acts which belonged then to this royal year of May, 1676–77; and hence we may assume that the measure had finally passed the two Houses long before the Christmas holidays of 1676 and quite probably about midsummer. The act by its own terms is declared to take effect from June 24, 1677; an indication, apparently, as to provisions so important that it went through Parliament about a year earlier." [2]

The purpose of Mr. Schouler's argument was to justify the view that Sir Matthew Hale, who died on Christmas day, 1676, played a preëminent part in shaping the Statute of Frauds, as tradition had said that he did, and specifically that Lord Mansfield's conclusion that Sir Matthew Hale did not draw the act,[3] was an error.

Putting to one side for the present the question of authorship, there is no doubt that Lord Mansfield was right as to the time of the passage of the Statute of Frauds. Not only was Sir Matthew Hale dead before it passed, but he was dead even before that first

---

[2] 18 AM. L. REV. 442, 443. In Chase's Blackstone, 3 ed., 1084, it is stated, however, that "Although Charles II. did not ascend the throne until 1660, 29th of May, his regnal years were computed from the death of Charles I., January 30, 1649, so that the year of his restoration is styled the twelfth of his reign."

[3] "It has been said that 'this act of 29 C. 2. *c.* 3. was drawn by Ld. Ch. J. Hale.' But this is scarce probable. It was not passed till after his death; and it was brought in, in the common way; and not upon any reference to the judges." Lord Mansfield in Windham *v.* Chetwynd, 1 Burr. 414, 418 (1757). In the report of Wyndham *v.* Chetwynd, found in 1 W. Bl. 95, 97, it is stated that "On the Argument, Lord Mansfield, Chief Justice, expressed his Doubts of that generally received Opinion, that Lord Hale drew the Statute of Frauds, 29 Car. 2., he having died in 1676, 28 Car. 2." In his opinion Lord Mansfield added: "I can never conceive, for the Reasons I formerly mentioned, that this Statute was drawn by Lord Hale; any farther than by perhaps leaving some loose Notes behind him, which were afterwards unskilfully digested." 1 W. Bl. 95, 98–99.

reading of the bill in the House of Lords which was followed by the successive legislative steps resulting in its final passage by both Houses and its approval by the king. The story is told by various items in the published journals of the two Houses, but before it can be properly outlined, it is necessary to say a word about the difference between the old style and the new style calendars. This is desirable also because at least one of the leading books on the Statute of Frauds misapplies the calendar in stating dates.

It was in March, 1582, that Pope Gregory XIII abolished the use of the old calendar, which had ceased to correspond accurately with the seasons or to indicate the days of the new moons, and substituted the one which we now have; but it was not until the year 1751 that the British were won over to the Gregorian Calendar, or new style, as it is called. In the latter year Lord Chesterfield, of polite and instructive memory, introduced into Parliament a bill which passed that year and which provided for the putting into effect of the new style beginning with the first of the following January. Under the new style the year began, as we are of course accustomed to have it begin, with January 1, while under the old style it began with March 25.[4] As the old style was eleven days ahead of the new — in the eighteenth century the vernal equinox occurred on March 10, old style, but March 21, new style, — the act provided that in September, 1752, the day after September 2 should be called September 14.[5] The change in calendars is apt to be somewhat misunderstood, just as the time of beginning of the new year under the old style in England is apt to be misstated. It is only the months of January and February and the first twenty-four days of March as to which it is ever necessary to change

[4] The date is often misstated. The old year going out and the new year coming in can be seen in the journals of the two houses of Parliament for 29 Car. II. On Saturday, March 24, 1676 old style, each house adjourned to the following Monday. The next date is Monday, March 26, 1677. See 9 Journal of House of Commons, 405, 13 Journal of House of Lords, 85–86. So, in 31 Car. II, on Monday, March 24, 1678 old style, each house adjourned to the next day, which appears as March 25, 1679. See 9 Journal of the House of Commons, 575–576; 13 Journal of the House of Lords, 474–475.

[5] Low & Pulling's Dictionary of English History, title "Calendar." It is interesting to note that the change in England from old style to new "met with a good deal of ignorant opposition. The common Opposition election cry was, 'give us back our eleven days.'" *Id.*

the year in expressing in new style the old style date. January, 1676, under the old style, is January, 1677, in the new, but April, 1676, or December, 1676, under the old style is the same under the new. Accordingly, when it is said in the old style that Sir Matthew Hale died on Christmas day, 1676, that means Christmas day, 1676, in the new style also.[6] But when it is said that the session of Parliament following the prorogation in November, 1675, met on February 15, 1676 old style, it means that it met on February 15, 1677 new style.[7]

And now we are ready to trace the legislative history of the statute's passage. As stated above, in November, 1675, King Charles II prorogued Parliament to February 15, 1676 old style, *i. e.*, February 15, 1677 new style. On February 15, 1677, by the new style which from now on we shall use, Parliament convened, and two days later, on February 17, 1677, there is an entry of the first reading in the House of Lords of "An Act for Prevention of Frauds and Perjuries." [8] Two days later, namely, on February 19, 1677, the second reading took place and the consideration of the bill was committed to thirty-seven temporal and ten spiritual lords named in the journal of the House of Lords. Following the list of names appeared the entry:

---

[6] The statement in 1 Reed on the Statute of Frauds, ed. 1884, § 1, p. 2, that "The Statute of Frauds was passed in the session of Parliament beginning February 15, 1676, and Sir Matthew Hale had died the previous Christmas (December 25, 1676, O. S.)," is erroneous, for it is apparent that the "O. S.," to designate old style as distinguished from the new, should not appear where it does, but instead should appear after "February 15, 1676," or else that date should read February 15, 1677. It was put where it was, undoubtedly, because the author thought that the Statute of Frauds was passed in 1676 and yet was sure that Sir Matthew Hale died before its passage.

[7] The Parliament which was sitting in the year of 29 Car. II began in 1661 just after the Restoration and, with various recesses and prorogations, lasted until dissolved in 1679. It did not sit in 1676, as we would date the year under the reformed calendar, for in the latter part of November, 1675, which date is the same under the old style and under the new style calendar, the king prorogued Parliament for a period of about fifteen months, namely, to February 15, 1676 old style, or February 15, 1677 new style. 4 Cobbett's Parliamentary History, 803. "The House of Commons elected after the Restoration first met on the 8th day of May, 1661. It continued to sit till the 25th of January, 1679. Vacancies had been filled up from time to time by new elections; and in these what was called the Country Party gradually predominated. But the general composition of the House was a curious admixture of by-gone and current opinions." 4 Knight's Popular History of England, 224.

[8] 13 Journal of House of Lords, 43.

"Lord Chief Justice Common Pleas,
"Justice Windham,
"Justice Jones, and
"Justice Scrogs,
} to assist." [9]

On March 6, 1677, the Earl of Dorset reported to the House of Lords "that the Committee for the Bill for preventing Frauds and Perjuries have met several Times; and are of Opinion, that the said Bill is fit to be engrossed with some Amendments." The amendments were then read twice and agreed to and the bill as amended was ordered engrossed.[10] On March 7, 1677, the act passed the House of Lords and was sent to the House of Commons.[11] It was received by the latter house on the same day.[12]

On March 13, 1677, the bill was read the first time in the House of Commons.[13] On April 2, 1677, it was read the second time.[14] On April 12, 1677, it was reported from committee, with several amendments which were twice read, "and all, but the last Amendment (which was to make the Bill temporary) were upon the Question, agreed." [15] The bill as amended was then read a third time and passed and sent to the House of Lords.[16] It was received by the latter house on the same day, and the amendments made by the House of Commons were read twice and agreed to.[17]

The next and last entry is in the journal of the House of Lords on April 16, 1677.[18] On that day the king came to the House of Lords and the Lords robed to meet him. The entry then reads:

"The House being resumed; and His Majesty sitting in His Royal Throne, adorned with His Regal Ornaments (the Peers being also in their Robes); the Gentleman Usher of the Black Rod was commanded to signify to the House of Commons His Majesty's Pleasure 'that they come up presently, and attend Him, with their Speaker.'

"Who being come; the Speaker (after a short speech) humbly presented His Majesty with Two Bills, which being received at the Bar by the Clerk of the Parliaments and brought to the Table, the Clerk of the Crown read the Titles of them. . . .

---

[9] 13 Journal of House of Lords, 45. On the practice of having judges assist the House see Pike, Constitutional History of the House of Lords, 246–248.

[10] 13 *id.* 62. [11] 13 *id.* 63.

[12] 9 Journal of House of Commons, 394. [13] 9 *id.* 398.

[14] 9 *id.* 410. [15] 9 *id.* 419. [16] 9 *id.* 419.

[17] 13 Journal of the House of Lords, 111. [18] 13 *id.* 120.

"To which Two Bills the Clerk of the Parliaments pronounced the Royal Assent, in these words,

"'*Le Roy, remerciant Ses bons Subjects, accepte leur Benevolence, et ainsi le veult.*'

"In the same Manner other Public Bills were passed; as,

"'1. — An Act for Prevention of Frauds and Perjuries,' . . .

. . . . . .

"'8. — An Act for the better Observation of the Lord's day, commonly called Sunday.'

"To these the Royal Assent was pronounced in these Words,

"'*Le Roy le veult.*'"

Thus, with pomp and ceremony, came into legal existence that Statute of Frauds which has been both so much praised and so much deplored; and its final passage and the royal assent to it must both be dated April 16, 1677.[19]

II. The Authorship of the Statute.

Down to the nineteenth century the framing of the Statute of Frauds was attributed mainly to Sir Matthew Hale, the model Chief Justice of the King's Bench, and to Sir Leoline Jenkins, an eminent authority on the canon law, though, as we have seen, Lord Mansfield in 1757 questioned the participation of Sir Matthew Hale, and though by some the honor of a leading part in the enactment of the statute was claimed for others, as for Sir Francis North (Lord Keeper Guilford). But in 1827 the previous tradition was shattered through the publication by Lord Eldon's reporter, Swanston, in the appendix to the third volume of his reports, at Lord Eldon's suggestion, of some manuscript opinions by Lord Nottingham discovered by Lord Eldon;[20] for among those was the opinion in Ash *v.* Abdy delivered in 1678, the year after the Statute

[19] It can be seen that the conclusion of Mr. Browne in the Introduction to his treatise on the Statute of Frauds that the statute "was never regularly engrossed with a view to its enactment" finds no support in the journals of the Houses of Parliament. Whatever its faults, the statute was not hastily drafted nor carelessly considered legislation. "The difference of phraseology in the different sections of the original English statute [of frauds] . . . may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands." Peters, J., in Bird *v.* Munroe, 66 Me. 337, 344 (1877).

[20] See 2 Swanst. 83.

of Frauds was passed, in which, in holding that the Statute of Frauds was not retroactive and so did not apply to a bill filed after the statute to enforce specifically an oral contract entered into before the passage of the act, Lord Nottingham said: [21]

"I had some reason to know the meaning of this law; for it had its first rise from me, who brought in the bill into the Lord's House, though it afterwards received some additions and improvements from the Judges and the civilians."

As Sir Matthew Hale resigned his office on February 21, 1676, because of growing weakness in body, and from about that time till his death on Christmas day, 1676, "was in so poor a State of Health that there was no hopes of his Recovery," [22] as Sir Leoline Jenkins was absent from England from December, 1675, to August, 1679,[23] and as Lord Nottingham's opinion in Ash *v.* Abdy was delivered so soon after the passage of the Statute of Frauds that its general truthfulness could not be questioned, it was but natural that, after the publication of that opinion, even those who believed that the Statute of Frauds was passed in 1676 should have found it difficult to contend that either Sir Matthew Hale or Sir Leoline Jenkins had much to do with the drafting of the statute or to deny that Lord Nottingham had the originating part in its production. Indeed, Lord Nottingham was accepted at once as the author of the statute. In Campbell's "Lives of the Lord Chancellors of England" it is said:

"It is now ascertained that Lord Nottingham was the author of the most important and most beneficial piece of juridical legislation of which we can boast — the famous 'Statute of Frauds,' the glory of which was long divided between Lord Hale and Sir Leoline Jenkins."

In a note Lord Campbell added:

"Lord Hale and Leoline Jenkins may have been two of the Judges and civilians who assisted in improving it. See Gilb. Rep. in Eq. 171, 1 North's Life of Guilford, 209, 1 Burr. 418, 5 East 17. If Lord Notting-

---

[21] Ash *v.* Abdy, 3 Swanst. 664 (June 13, 1678).

[22] Burnett's Life and Death of Sir Matthew Hale, ed. 1682, 65.

[23] He reached Nimeguen on his peace embassy on January 6, 1675. 1 Wynne's Life of Sir Leoline Jenkins (1724), p. xxvi. He seems not to have returned to England until August, 1679. *Id.* p. xl.

ham drew it he was the less qualified to construe it, the author of an act considering more what he privately intended than the meaning he has expressed." [24]

But too much has been left to conjecture and too little attention has been paid to what is contained in the accessible records. In the published journals of the two Houses of Parliament is material that clears away most of the difficulties. We must go to those journals for the rest of the truth which was only partially disclosed in the discussion regarding the date of the statute. We there traced the history of the Statute of Frauds from its first reading in the House of Lords on February 17, 1677, through its amendment there and in the House of Commons, until its final passage and the royal assent to it on April 16, 1677; but we did not note, what others dealing with the statute seem to have overlooked, that the bill was in Parliament several times before.

The first introduction of the bill seems to have been on February 16, 1673 old style, February 16, 1674 new style, for there is noted in the journal of the House of Lords of that date the first reading of "An Act for preventing many Fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury." [25] One who reads that title can hardly doubt that the bill was the original bill which after some vicissitudes, including a re-introduction in 1675 and some amendments, was finally re-introduced on February 17, 1677, and became law as the Statute of Frauds. On February 20, 1673 old style, February 20, 1674 new style, the bill was read a second time and its consideration committed to forty-four temporal lords and eleven spiritual lords.[26] It then seems to have been smothered in committee.

Again, on April 14, 1675, there is noted in the journal of the House of Lords the first reading of "An Act for Prevention of Frauds and Perjuries." [27] On April 15, 1675, occurred the second reading of the bill and the commitment of its consideration to thirty-five temporal and eight spiritual lords.[28] On May 10, 1675, the Earl of Ailesbury [29] reported

---

[24] 4 Campbell's Lives of the Lord Chancellors of England, 4 Eng. ed., 271.

[25] 12 Journal of the House of Lords, 638.

[26] 12 *id.* 645. [27] 12 *id.* 656. [28] 12 *id.* 659.

[29] Elsewhere in the Journal sometimes spelled Aylesbury.

"That the Committee appointed to consider the Bill for Prevention of Frauds and Perjuries have met several Times; and have, *upon the advice of the Judges*,[30] made several Amendments therein; which are offered to the Consideration of the House." [31]

The amendments were then read twice and agreed to and the bill as amended ordered engrossed.[32] Then on May 12, 1675, the bill was read a third time and passed and sent to the House of Commons.[33] It reached the House of Commons on the same day.[34]

On May 26, 1675, the bill was read the first time in the House of Commons and ordered to be read a second time, [35] but apparently was not read again in the House of Commons. The next appearance of a Statute of Frauds' bill in the House of Commons was when the third and last one was sent to that house by the Lords in March, 1677, and on that appearance, as we have seen, it passed with amendments.

In reference to the two appearances of the Statute of Frauds before that final introduction of it which ended in its passage, two things should be noted, namely, (1) that the Earl of Shaftesbury was on the first two committees of the House of Lords named to consider the bill,[36] and (2) that the presiding officer of the House of Lords on each occasion was Sir Heneage Finch, who on November 9, 1673, was made Lord Keeper, on December 19, 1675, became Lord High Chancellor, and on May 12, 1681, was given the title of Earl of Nottingham.

It should be remembered that the Earl of Shaftesbury had been Lord High Chancellor from November 17, 1672, to November 9, 1673, having succeeded Lord Keeper Orlando Bridgman as the custodian of the Great Seal. Lord Keeper Bridgman, whose fame as a learned conveyancer has been lasting, was removed from office through political intrigue to make way for Shaftesbury, and was still alive when the first bill for the statute intended to prevent frauds and perjuries was smothered in committee. That the Earl of Shaftesbury, who ceased to be Lord High Chancellor only a little over three months before that first bill was referred to the committee on which he was named, gave the bill such attention as his

[30] The italics are mine.
[31] 12 Journal of the House of Lords, 686.
[32] 12 *id.* 686.
[33] 12 *id.* 689.
[34] 9 Journal of the House of Commons, 335.
[35] 9 *id.* 345.
[36] 12 Journal of the House of Lords, 645, 659.

total lack of practice at the bar, his meagre judicial experience, and his active political interests permitted cannot be doubted. During the consideration of the amendments suggested by the judges to the committee that considered the second bill, the Earl of Shaftesbury must have been present. The importance of the measure makes that conclusion irresistible.[37]

The record evidence that the Earl of Shaftesbury had some part in the committee consideration of the Statute of Frauds raises at once the question whether his predecessor, Lord Keeper Bridgman, was not also consulted about the statute. Sir Orlando Bridgman did not die until June 25, 1674, while the first bill was introduced in the House of Lords on February 16, 1674, so he could have had a hand in its original drafting and after that bill was killed in committee could have suggested changes to be made before its next

[37] The reason why ex-Chancellor Shaftesbury was not on the third and last committee of the House of Lords to consider the Statute of Frauds was that he was at the time of its appointment imprisoned in the Tower for contempt of the House of Lords in insisting, while supporting a motion of the Duke of Buckingham made February 15, 1677, that under certain statutes of Edward III the prorogation of Parliament for over fourteen months, namely, from November, 1675, to February, 1677, worked a dissolution of Parliament and in refusing to beg pardon for doing so. The Duke of Buckingham, Lord Wharton, the Earl of Salisbury, and the Earl of Shaftesbury were all committed to the Tower for this offense under an order of the House made February 15, 1677, two days before the third and last draft of the Statute of Frauds was read for the first time in the house. The Earl of Shaftesbury still further offended the House of Lords by applying on June 23, 1677, to the Court of King's Bench for a writ of *habeas corpus*. That court held that it had no power to interfere with the discipline by the House of Lords of its own members and Shaftesbury was sent back to the Tower. In consequence of his *habeas corpus* proceedings he was kept in prison longer than were the others punished with him. He was not released until late in February, 1678; and then only on making submission to the House of Lords in these words: "I do acknowledge that my endeavoring to maintain that the Parliament is dissolved was an ill advised action, for which I humbly beg the pardon of the King's Majesty and of this most honorable House; and I do also acknowledge that my bringing of a *habeas corpus* in the King's Bench during this session was a high violation of your Lordships' privileges and a great aggravation of my former offense, for which I likewise most humbly beg pardon of this most Honorable House." 2 Christie's Life of the First Earl of Shaftesbury, 259. On February 27, 1678, his name appears once more in the journal of the House of Lords in the list of Peers recorded as present. 13 Journal of the House of Lords, 163. The order of February 15, 1677, committing Shaftesbury and the others to the Tower, and all subsequent proceedings in their matter, were on November 13, 1680, declared by the House of Lords unparliamentary and ordered vacated. 13 Journal of the House of Lords, 684. Accordingly, in the published journal of the house only asterisks are to be found where those proceedings would otherwise appear.

introduction. In view of his exceptional skill as a conveyancer and his great learning, it is difficult to believe that he was not consulted, at least by letter, about the real property and the trust sections of the statute, even though it be true that "After his fall [from the Lord Keepership in November, 1672] he lived in entire seclusion at his villa at Teddington" until his death.[38]

But the significant thing is the way the records bear out Lord Nottingham's statement in the case of Ash *v.* Abdy. He says that the statute "had its first rise from me, who brought in the bill into the Lord's House." He was Lord Keeper when the first and second bills were introduced in the House of Lords and he was Lord High Chancellor when the third and last bill was introduced and passed. As presiding officer of the House of Lords during all that time his opportunity to do what he said he did was ample. It cannot be doubted that he introduced the bill. Then consider his further statement that while he brought in the bill "it afterwards received some additions and improvements from the Judges and civilians." We know from the report of the committee of the House of Lords noted in the journal of that house for May 10, 1675, that "upon the advice of the Judges," whoever they may have been, certain amendments were adopted, and we know also that the third and final bill was amended both in the House of Lords, where certain judges had been named to assist the committee, and in the House of Commons.

But while we do not know exactly who the judges were who recommended changes in the bill in 1675, we need no longer doubt that Sir Matthew Hale was one. He was alive and in a state of health to be consulted, — he did not retire for ill health until 1676, — and as he could be consulted, the statement in North's life of Lord Keeper Guilford that Lord Chief Justice Hale "had the Pre-eminence and was chief in fixing that law [the Statute of Frauds]"[39]

---

[38] 4 Campbell's Lives of the Chancellors, 4 Eng. ed., 152.

[39] "He [Sir Francis North] had a great Hand in the Statute of Frauds and Perjuries of which the Lord Nottingham said that every Line was worth a subsidy. But, at that Time, the Lord Chief Justice Hales had the Pre-eminence and was chief in the fixing that Law: Although the urging Part lay upon him [Sir Francis North] and I have reason to think that it [the Statute of Frauds] had its first Spring from his Lordship's [Sir Francis North's] Motion. For I find in some Notes of his and Hints of Amendments in the Law, every one of those Points which were there taken Care of." Roger North's Life of Francis North, Baron of Guilford, ed. 1742, 109.

must be taken as sufficient evidence that at least he had a large part in shaping the statute. The statement is entitled to all the more weight because, as we have seen, the committee appointed to consider the third and last bill in the House of Lords had assigned to assist it, not only Justices Windham, Jones, and Scrogs, but also the Lord Chief Justice of the Common Pleas. Sir Francis North, who had become Chief Justice of the Common Pleas on January 23, 1675, and who in the course of his services rendered to the committee must have become acquainted with the contributions to the statute made by different judges, may fairly be counted on to have told what he found out to the brother who wrote his Life and who in it gave Sir Matthew Hale the credit for the statute. That Sir Matthew Hale made real contributions to the Statute of Frauds cannot fairly be doubted.

It seems just as certain that Sir Leoline Jenkins also contributed to it. Lord Nottingham's statement attributes amendments to the judges "and the civilians." Of course the civilians had a hand — the lords spiritual on the several committees would see to that with reference to any bill containing comprehensive will and land provisions. Sir Leoline Jenkins did not leave England for those years of absence which we have mentioned till December, 1675, and he had practically the same opportunity to be consulted and to propose amendments that Sir Matthew Hale had. Whether he contributed only the little that his biographer Wynne claims,[40] or actually did more, it seems clear that he contributed something.

Now a word about the Justices Windham, Jones, and Scrogs named to assist the committee of lords appointed to consider the last bill.

Justice Windham was the Hugh Wyndham or Hugh Windham who on June 20, 1670, was made Baron of the Exchequer, and who on January 22, 1673, was removed to the Common Pleas. Foss says of him, "In neither court did he particularly distinguish himself."[41]

Justice Jones was the Thomas Jones who was made a judge of

[40] "He [Sir Leoline Jenkins] had likewise some hand in preparing the Statute of Frauds and Perjuries; especially that Proviso in it, which excepts the Wills of Soldiers and Seamen from the strict Formalities required in the Wills of other Persons, leaving them to the full privilege of the old Roman Military Testament." 1 Wynne's Life of Sir Leoline Jenkins (1724), p. liii.

[41] Foss, Biographical Dictionary of the Judges of England, 774.

the King's Bench on April 13, 1676, and on September 29, 1683, succeeded as Chief Justice of the Common Pleas Sir Francis North, appointed Lord Keeper on December 20, 1682. On April 21, 1686, Chief Justice Jones was dismissed from office for a remark of his made to King James when the latter said that he wanted twelve judges, Jones among them, to declare in favor of the king's dispensing power, *i. e.*, the power to relieve individuals or classes of persons from the necessity of complying with the religious Test Act passed by Parliament. Chief Justice Jones's remark was that "possibly his Majesty might find twelve *judges* of his opinion, but scarcely twelve *lawyers*," [42] since the king had no power to dispense with a statute which Parliament had enacted for the preservation of the established religion of the country.

Justice Scrogs was the William Scroggs who was made a justice of the Common Pleas on October 23, 1676. On May 31, 1678, he became Chief Justice of the King's Bench, from which position he was removed on February 16, 1680. Lord Campbell says of him that "Scroggs had excellent natural abilities, and might have made a great figure in his profession; but was profligate in his habit, brutal in his manners, with only one rule to guide him — a regard to what he considered his own interest — without a touch of humanity, wholly impenetrable to remorse." [43]

It has been shown then by official records that the Statute of Frauds was finally passed and received the royal assent on April 16, 1677; that Lord Nottingham, who announced within fourteen months after the passage of the statute that the statute "had its first rise from" him, was the presiding officer of the House of Lords during the whole time that the successive bills of 1674, 1675, and 1677 were before Parliament; that the Earl of Shaftesbury, ex-Lord Chancellor, was a member of the committees appointed in the House of Lords to consider the first two bills; that on May 10, 1675, "upon the advice of the judges," the second bill was amended in the House of Lords, on March 6, 1677, the third and last bill was amended in the House of Lords, and on April 12, 1677, the third bill was amended in the House of Commons (Lord Nottingham's statement that the statute "received some additions and improvements from the judges and the civilians" being thus veri-

[42] Foss, Biographical Dictionary of the Judges of England, 378.

[43] 2 Campbell's Lives of the Chief Justices of England, ed. Boston, 1873, 254.

fied); and that Justice Hugh Wyndham of the Common Pleas, Justice Thomas Jones of the King's Bench, Justice William Scroggs of the Common Pleas, and Sir Francis North, Chief Justice of the Common Pleas, were assigned by the House of Lords on February 19, 1677, to assist the committee of the house to which was entrusted the consideration of the third and last bill. It has also been demonstrated that before the first bill was smothered in committee Sir Orlando Bridgman, ex-Lord Chancellor, who as the foremost conveyancer of his day would naturally have been asked to criticize those provisions of the statute affecting conveyancing, could have been consulted in person by the Lord Keeper, father of the statute; that while the first two bills for the statute were before Parliament Sir Leoline Jenkins, whose learning in the civil law would naturally have been requisitioned by the lords spiritual on the various committees appointed to consider the bill, could have been consulted in person as to the drafting and amendment of those first two bills; and that while the first two bills were before Parliament Sir Matthew Hale, the great Chief Justice of the King's Bench, whose learning and political influence were such as to make it imperative that his approval of the proposed statute be obtained, could have been consulted in person and could have been one of "the Judges" upon whose recommendation amendments to the second bill were voted in the House of Lords on May 10, 1675. That Sir Leoline Jenkins, Sir Francis North (later Lord Keeper Guilford), Sir Matthew Hale, and Lord Nottingham, as well as many lesser legal lights, had a hand in making the statute, cannot be doubted.

The proper division of the glory of authorship of the statute, if indeed it be glory,[44] may be left to others, but in conclusion it may

[44] In a book of lectures on contracts by the learned editor of Smith's Leading Cases it is said: "The great Lord Nottingham used to say of it '*that every line was worth a subsidy*,' and it might now be said with truth that every line has *cost* a subsidy, for it is universally admitted that no enactment of any legislature ever became the subject of so much litigation. Every line and almost every word of it has been the subject of anxious discussion resulting from the circumstances that the matters which its provisions regulate are those which are of every day occurrences in the course of our transactions with one another." Smith, Contracts, 6 Am. ed., *70–71. In 1 Throop on Verbal Agreements, ed. 1870, 72, note, a subsidy is estimated at about £50,000.

"It was said at Westminster Hall, more than seventy years ago, that the Statute of Frauds had not been *explained* at a less expense than one hundred thousand pounds sterling; and Chancellor Kent, at the time he wrote his Commentaries,

be well to point out the significance of the fact that various Lord Keepers and Lord Chancellors played a part in the statute's enactment. Professor James Bradley Thayer's surmise that the provisions about contracts and about wills were intended by the statute's authors and enactors primarily to keep certain cases away from juries[45] must be considered in connection with that fact, for the two things serve to explain chancery's attitude toward the Statute of Frauds. It can hardly be doubted that when Lord Chancellor Jeffreys, who succeeded Lord Keeper Guilford, decided Butcher *v.* Stapeley,[46] — one of the earliest cases in which the chancery court gave specific performance of a partly performed contract which could not be recovered upon at law because of the lack of the written evidence required by the Statute of Frauds, — the reason why he held that the statute did not apply was because its framers never intended that it should.[47] If it be true

thought the sum might then be put down at a million and upwards. 2 Kent's Comm. 513, note. These are both very safe estimates, and still the statute is not yet 'explained.'" Bronson, J., in Downs *v.* Ross, 23 Wend. (N. Y.) 270, 272 (1840).

[45] "The older law and the older decisions relating to them were often mainly concerned in keeping matters out of the hands of juries. This motive appears in the language of the Statute of Fines . . . and it seems to have had its place in bringing into existence the English Statute of Frauds." Thayer's Preliminary Treatise on Evidence, 409–410. "It is not probable that so wide reaching an act could have been passed if jury trial had been on the footing which it holds today." *Id.* 430.

[46] 1 Vern. 364 (1686).

[47] The House of Lords' decision in Lester *v.* Foxcroft, Colles' Cases in Parliament, 108 (April 7, 1701), confirms this conclusion. It must be admitted that this view would be much more likely to receive universal assent if Sir Francis North, as Lord Keeper Guilford, had rendered the decision in Butcher *v.* Stapely, 1 Vern. 364. While the decision has been credited to Lord Guilford by Lord Chancellor Selborne in Maddison *v.* Alderson, 8 App. Cas. 467, 477 (1883), and, recently, by Mr. Jenks (A Short History of English Law, 217, note), that credit was doubtless given through a confusion of the calendars. Jeffreys was appointed Lord Chancellor on September 28, 1685, and Butcher *v.* Stapely appears in 1 Vernon as decided February 10, 1685. But the report shows that the opinion was by "The Lord Chancellor," and preceding the case in 1 Vernon are cases dated after March 25, 1685, so it is evident that the date of February 10, 1685, assigned to the case is February 10, 1685 old style, or February 10, 1686 new style, and that Lord Chancellor Jeffreys decided it. While Lord Guilford gave unsatisfactory opinions in Hollis *v.* Whiteing, 1 Vern. 151 (March 2, 1683 new style), and in Hollis *v.* Edwards, 1 Vern. 159 (May 1, 1683), his opinion in Hollis *v.* Whiteing showed that he recognized the right of equity to give relief in some cases even if the Statute of Frauds was not complied with. The full report of the case is as follows:

"The bill was to have the execution of a parol agreement for a lease of a

that "equity, even before the Statute of Frauds, would not execute a mere parol agreement not in part performed," [48] and that the part-performance served because the possession given the vendee which was essential to the part-performance was the equivalent of livery of seisin,[49] then the statute's framers were thoroughly familiar with the part-performance problem, and the decisions which shortly after the passage of the Statute of Frauds settled the law that part-performance would make the oral contract for the sale of land enforceable in chancery, notwithstanding the statute, are conclusive evidence that its framers never intended the statute to prevent the giving of equitable relief in the part-performance cases. The judges who framed the Statute of Frauds were so anxious to tie the hands of juries and so possessed by the idea that the statute would not apply *ex proprio vigore* to chancery cases that they neg-

---

house, setting forth that in confidence of this agreement the plaintiff had laid out and expended very considerable sums of money, etc.

"The defendant pleaded the statute of Frauds and Perjuries, and the plea was allowed. *But the Lord Keeper was of the opinion, that if the plaintiff had laid in his bill that it was part of the agreement that the agreement should be put into writing, it would alter the case, and possibly require an answer.*" The italics do not appear in the report.

Lord Guilford, therefore, recognized that equity could give relief in some instances where the statute was not complied with, but did not properly define those instances. See Browne, Statute of Frauds, 5 ed., § 446. While Lord Guilford would be worth citing on the subject of the authorship of the statute, the House of Lords' decision in Lester *v.* Foxcroft, *supra,* is more satisfactory evidence of the intent of the framers of the statute than are Lord Guilford's decisions. When Lester *v.* Foxcroft was decided there were doubtless in the House of Lords some peers who assisted in the framing and passage of the Statute of Frauds. That was a time when all members of the House of Lords who cared to do so participated in deciding cases taken on error or on appeal to the House; when the suits were decided there by a majority vote of the Lords (see Hale, Jurisdiction of the Lords House of Parliament, Hargrave, ed. 1796, 155); and when it was still true that though they took the advice of judges as to the causes, "The Lords exercised the mixed functions of jurymen and judges, and, as in judgments on impeachment, might be influenced by private or party considerations, debating and dividing on the question before the House." W. F. Craies on Appeal in 2 Ency. Britt., 11 ed., 214. See Hale, Jurisdiction of the Lords House of Parliament, Hargrave, ed. 1796, 155–159. Lord Chancellor Jeffreys' decision in Butcher *v.* Stapely in 1686, and the House of Lords' decision in Lester *v.* Foxcroft in 1701, are sufficiently near to the passage of the Statute of Frauds for them to be taken as representative of the intent of the statute's framers.

[48] Sugden on Vendors and Purchasers of Estates, 14 ed., 152.

[49] See Miller *v.* Lorentz, 39 W. Va. 160 (1894); Poorman *v.* Kilgore, 26 Pa. St. 365 (1855).

lected to be as explicit in the wording of the statute as they should have been. But as the intent of the judges who inspired and worded the statute was the intent of Parliament, since Parliament simply enacted what they recommended, and as the judges proceeded to make the proper exceptions to the application of the statute in chancery, no harm was done. The chancery judges very sensibly accepted the statute as the rule for chancery as well as law, except where part performance or other happenings would make the application of the statute in the given case against conscience.[50]

The demonstrated authorship of the Statute of Frauds makes it clear, therefore, that the chancery judges did not intentionally legislate judicially out of the Statute of Frauds any matters which they understood Parliament to have meant it to cover. A remark of Lord Campbell, already quoted in this article, explains quite simply, though of course unintentionally, the innocence of legislative intent of the chancery judges in the part-performance cases; for that remark, though directed at Lord Nottingham, would equally apply to any other judge who actively participated in the statute's framing or was influenced in his views of the statute by those who did so participate. The remark may well be repeated, not because as a whole it can be approved, but because it contains the psychology which seems to be needed for the full understanding of chancery's attitude toward the Statute of Frauds:

"If Lord Nottingham drew it [the Statute of Frauds], he was the less qualified to construe it, the author of an act considering more what he privately intended than the meaning he has expressed."

It would, however, seem truer to say that, whatever may be the case as to the authors of other statutes,[51] it was just because the authors of the Statute of Frauds, who were also called upon to construe it, considered what they privately intended as well as the

[50] "Generally speaking, though professing themselves not to be strictly bound by the words of the Statute of Frauds, equitable tribunals refused to enforce contracts for which the statutory evidence of writing required by that statute was not forthcoming. But if the defendant had fraudulently prevented the proper evidence being used, or had admitted in his pleadings the terms of the contract, or, if in reliance on the contract the plaintiff had incurred loss or liability in part performance of it, then a court of equity would decree specific performance; even though no action lay at law." Jenks, Short History of English Law, 217.

[51] See Maxwell on the Interpretation of Statutes, 5 ed., 42–47; Black, Construction and Interpretation of the Laws, 312–315.

meaning which they expressed that they and their successors who accepted their point of view proved so well qualified to interpret that statute.[52]

George P. Costigan, Jr.

NORTHWESTERN UNIVERSITY LAW SCHOOL.

---

[52] In Sedgwick on the Interpretation and Construction of Statutory and Constitutional Law, 2 ed., 205, it is said: "It may very well be that in the condition of English jurisprudence in former times, when laws were few and rarely passed, when the business of legislation was confined to a small and select class to which practically the judiciary belonged, when the legislative and judicial bodies sat in the same place, and, indeed, in the same building, — in such a state of things, it may well be that the judiciary might suppose themselves to possess, that they might indeed really possess, a considerable personal knowledge of the legislative intent, and that they might come almost to consider themselves as a co-ordinate body with the legislature."